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NO. .....

IN THE

Supreme Court Of The United States

October Term, 1984

THE CITY OF MONTGOMERY, et al.,
Petitioners,

vs.

TATE WILLIAMS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

ON APPEAL FROM THE ELEVENTH CIRCUIT COURT OF APPEALS

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Mayor Emory Folmar
Chief Jim Sutherland

January 18, 1985

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Should this Court grant certiorari to review a final judgment against the City of Montgomery, its Mayor, and its Fire Chief where the City-County Personnel Board, an independent agency created by the legislature, acts in a judicial capacity in hearing evidence in a proceeding where the City is an adversary and the Board acts as an independent body and the City has no control over the actions of the Board. In other words, is the City liable for the actions of the Board over which it has no control, no right to control nor actual control and the Board acts contrary to the City's positions and the City's wishes?

2. Should this Court grant certiorari to review a final judgment against the City of Montgomery, the Mayor and its Fire Chief where there is great public interest, manifest injustice and the judgment holds that an independent statutory board created by legislature is actually the agent of the City when it reviews actions of the City on appeal of personnel matters?

THE PARTIES

In the District Court and the Eleventh Circuit Court of Appeals, the parties were Tate Williams, Plaintiff; and Mrs. Ed Reid, Ewell Green, and Charles B. Patterson, individually and as members of the Montgomery City-County Personnel Board, the City of Montgomery, Mayor Emory Folmar, Mayor of the City of Montgomery and Jim Sutherland, Fire Chief of the City of Montgomery, Alabama, Defendants. The same parties remain throughout this litigation.

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OPINIONS AND ORDERS BELOW

The opinion of the United States District Court for the Middle District of Alabama, Northern Division reported at 550 F.Supp. 662 and the two opinions of the Eleventh Circuit Court of Appeals are submitted as Appendix "A" to this Petition.

JURISDICTION

The first opinion of the Eleventh Circuit Court of Appeals and the corrected opinion of the Eleventh Circuit Court of Appeals is dated March 3, 1984. Petition for Rehearing and

Suggestion for Rehearing En Banc was denied October 22, 1984.

This Court may grant certiorari under 28 USCA 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Alabama Act 2280 sets up the City-County Personnel Board.

STATEMENT OF THE CASE AND MATERIAL FACTS

Complaint was filed on June 10, 1981 (R. 1) claiming the Defendants discriminated against Plaintiff in violation of Title VII of the Civil Rights Act of 1964, 42 USCA Sections 2000e-2000e-17 by failing to order reinstatement of a black fireman when two white firemen had been previously reinstated. Motion to Dismiss was filed July 1, 1981 by the Montgomery City-County Personnel Department and the members of the Board (R. 8). The amended Complaint was filed July 21, 1981 R. 12). The City of Montgomery, Mayor Folmar and Chief Sutherland filed their Motion to Dismiss July 1, 1981 (R. 6). Both motions were denied August 13, 1981 (R. 21). Answers to the Complaint as amended were filed by the Board and its members August 18, 1981 (R. 25), and the City, Folmar and Sutherland November 17, 1981 (R. 29).

Motions for Summary Judgment were filed by the City, Folmar and Sutherland on December 2, 1981 (R. 45, 76), and by the Board and its members (R. 69, 72, 94). Demands for jury trial (R. 39) were denied December 1, 1981 (R. 44). Plaintiff's Motion for Summary Judgment was filed (R. 141). All motions, including the request for jury trial and summary judgment, were denied February 25, 1982 (R. 161). The trial was held March 2, 1982. The Court's opinion was filed October 19, 1982 (R. 171). Notice of Appeal and for a stay was filed by the City, Folmar and Sutherland November 17, 1982 (R. 207). The stay of the back pay award was granted December 23, 1982 (R. 243).

The facts showed that in August, 1976 two white firemen

were convicted of a felony, placing bets. The City, in keeping with City policy, discharged both of them. They appealed their discharge to the City-County Personnel Board as they have a statutory right to do. Because they were only minimally involved in the criminal activity, the crime was victimless, twenty six witnesses supported them, they presented a petition signed by two hundred fifty supporters including Tate Williams, the Plaintiff in this case, they produced a letter from the United States Attorney urging that they be rehired, they had the backing of the Disciplinary Board of the Fire Department and the Fire Department, they admitted their guilt, and they had union support, the City-County Personnel Board overturned the discharge over the City's strenuous objection and ordered them rehired.

Twenty seven months later in November, 1979, Plaintiff, who is black, pleaded not guilty to a felony but was tried and convicted of obtaining a stereo under false pretenses. He too was discharged by the City just as the white firefighters had been. He also appealed his discharge to the City-County Personnel Board as he had a statutory right to do. The City, just as they had done in the case of the white firefighters, objected to his reinstatement. This time, because there was a victim of the crime, active fraud, no support from any petitions, disciplinary boards, U. S. Attorneys nor unions, and Plaintiff still maintained his innocence instead of cooperating with authorities, the City-County Personnel Board denied his appeal. Only Plaintiff appeared in the ten minute hearing before the Board while twenty six witnesses appeared in the three and one half to four hour hearing conducted in the 1976 hearing. Both whites and the black were afforded the same substantive and procedural rights at their hearings. It was Williams', the black fireman, decision to produce no witnesses and to offer no evidence in his behalf. Despite the vastly different offenses and hearings the Trial Court held that the reason for the black not being reinstated was racial motivation. The Trial Court went on to hold the City liable because the City-County Personnel Board discriminated. The Trial Court held that reasons for

different treatment were irrelevant. The Court of Appeals for the Eleventh Circuit affirmed.

ARGUMENT

The evidence in this case shows that there were three firemen that were convicted of felonies and all three were dismissed by the Defendant, City of Montgomery. Two of the firemen, Evans and Morgan, were white. Tate Williams is black. All three were treated exactly the same by the City, even though the City might have found, and justifiably found, mitigating circumstances in the case of the white firemen. What the Defendant, Personnel Board, did after the City's dismissal was beyond the control of the City, yet the City is held liable in this case because the legislation delegated to the Board gave traditional rights normally exercised by the employer. To say the least, this departs from an accepted and usual course of judicial proceeding. The fact is, in the City's opinion, none of the three met the minimum standard requirements and should have been dismissed and those dismissals should have been sustained.

The white firemen had the support of the rank and file firefighters as is evidenced by the petitions signed by their coworkers. The black fireman had no such support. Is this the fault of the City? Can the City dictate when firemen sign petitions and whom they must support in Personnel Board hearings? That would be unconstitutional and would not be tolerated by any court.

The white firemen presented evidence to the Board that their transgressions were minimal, and would have been only a misdemeanor had one been available for them to be charged with. No such evidence was presented by Mr. Williams. Is that the fault of the City? Certainly not.

The need for having honest firemen free from the stigma of being convicted of felonies, such as Williams was convicted, was demonstrated by Chief Sutherland (R. 74). The factors probably considered by the Disciplinary Board were their min-

imal involvement, but what the Disciplinary Board considered is still not the City's fault. The Disciplinary Board is no more controlled by the City of Montgomery than the Personnel Board is.

When Evans and Morgan appeared before the Personnel Board, twenty six witnesses appeared in their behalf. When Williams appeared, only he testified. He had no supporting witnesses and offered no mitigating circumstances why his dismissal should be overturned. The Evans and Morgan hearing lasted three and one-half to four hours. The Williams hearing lasted ten minutes. The Board was sent a letter by United States Attorney, Ira DeMent, requesting that Evans and Morgan be reinstated. No such letter came from any prosecutor in the Williams case. In spite of all this evidence, differentiating Evans, Morgan and Williams, the Trial Court held that the reasons Evans and Morgan were reinstated and Williams was not were racial reasons. The Trial Court even went so far as to state that members of the Personnel Board that testified in the hearing lied giving their reasons for differentiating the two cases (Footnote 4, page 6 of the Trial Court's opinion). The Trial Court found the reasons that the Personnel Board members gave were "pretextual", and that their testimony was "clearly a fabricated afterthought". Nothing could be further from the evidence. These dedicated public servants who serve on this board without pay deserve better treatment than to be accused of lying under oath.

The Appellant, Personnel Board, will no doubt defend and thoroughly brief their innocence of discrimination. The City, Fire Chief, and Mayor are held liable in the Trial Court's opinion because "the remaining defendants are all agents of the City of Montgomery". How the Trial Judge could draw that conclusion in light of the testimony in this case is beyond belief. Wade Moss testified that he was the Personnel Director, that the Board is a separate entity of the City and County, and is set up by the State Legislature. One appointment is made by the Montgomery County Commission, one by the Montgomery City Council and one by the judges and probate judge of

Montgomery County. The statute creating the Board provides that the findings of the Board shall be final and conclusive and shall not be reviewable by any court. Mr. Moss testified that the Board exercises its independent fact-finding and own judgment free of political influence or other influence from the City and County. The Personnel Board does its work based on the evidence. If the Board members do not feel the evidence justifies a termination, they will overturn the City's action (R. 135). There were no outside forces of any kind influencing the Personnel Board (R. 137). The question of race never came up in any manner in the hearings of Evans, Morgan or Williams. The Board functions much like a judge and a jury would in a civil court (R. 148). In light of the autonomous status of the Personnel Board, the Trial Judge holds that the City is liable because they discriminated. What can the City do to assure that they are not liable because of someone else's alleged discrimination? They are put in the position of being liable because the Board discriminated when they have absolutely no control over the Board and can have nothing to do with how the Board handles the different situations that come before it. Mr. Ewell Green testified that the Personnel Board did not feel that it was bound by the Fire Department's policy. He said that he reached a conscientious, independent judgment in his deliberations on the Evans, Morgan and Williams cases (R. 165). Mr. Green enumerated the reasons that he voted the way he did.

Mrs. Ed Reid, a Board member, testified as to the reasons why she voted the way she did on the Evans, Morgan and Williams cases. The Trial Judge characterized her testimony as being false. She testified that the fact that Evans and Morgan were white had no bearing at all. Her decision would have been the same had they been black. She testified that Evans and Morgan pleading guilty and not perjuring themselves entered into her judgment. She said that her judgment was independent (R. 207), based on the evidence presented at the hearing. She said that her decision had nothing to do with the fact that Williams was black (R. 210), that she felt there was

a difference between the two offenses. It had always been the policy of the Personnel Board to consider mitigating circumstances and they reduced punishment when they considered it too severe. She said there was no difference in the hearing procedure for Evans, Morgan and Williams. She says that the letter from Mr. DeMent stating that he would have charged Evans and Morgan with a misdemeanor had a charge been available had a lot to do with her decision (R. 201).

Even Mr. Williams refused to say that his race had anything to do with his termination by the City. In answer to the question, he stated, "I am not going to answer that" (R. 266).

The Trial Court did not find the City guilty of discrimination, but did state that the Fire Department did not seriously seek to have the policy upheld by the Personnel Board in the cases of the two white firemen. This is diametrically opposed to the testimony of Mr. Mandell, who went into detail concerning the hearing and the evidence presented and stated under oath that race never entered into the discussions involving Evans and Morgan (R. 209). He stated that the decision was based on the evidence and was a reasonable one. He further stated, on page 243 of the Transcript of Testimony, that there was an adversary relationship between the union and the City and there was no collusion at the hearing. Mr. Mandell went into detail concerning his efforts at the Evans and Morgan hearing on behalf of his clients.

Mr. Green testified that the Personnel Board did not consult the personnel file of Evans, Morgan or Williams (R. 165, 166). How then can there be discrimination in treating the three differently if none of their records were available? The Trial Court criticizes the Personnel Board for not articulating reasons for sustaining the Williams termination until after Williams made his claim. There is no rule, regulation or law that requires the Personnel Board to give their reasons following a hearing. These were the only three people who ever fell into the category of felonious firemen, and there was no reason for the Personnel Board to make any written decision that enuherated their criteria. To fault them at this point in the game

for not articulating reasons for their decision is not justified. The Trial Court Judge has disregarded the evidence presented by the Personnel Director, Mr. Moss, and Board members Reid and Green, and has adopted his own subjective thoughts as to why the Personnel Board acted as it did.

The Trial Court assessed the Personnel Board's reasons for the differing results between the two white firemen and the black fireman. The Board's stated reasons listed below were disregarded by the Trial Judge. Those are as follows:

Evans and Morgan	*Williams*
Minimal participation	Active fraud
Victimless crime	A victim
Placed football bets	Fraud, obtained a stereo
Twenty six witnesses	One witness (himself)
Petition signed by 250, including Williams	No petition
Letter from prosecutor recommending reinstatement	No letter, no recommendation
Backing of Disciplinary Board	No backing
Admitted guilt	Maintained innocence
3½ to 4 hour hearing	10 minute hearing
Union support	No union support
Fired by City	Fired by City

Instead of considering these reasons for treating the cases differently, the Trial Court found their reasons strictly racial. The evidence does not warrant such a conclusion.

The Trial Court ignored the testimony of Randall Morgan, the attorney for the City that sought to sustain the City's termination of Evans and Morgan. Mr. Randall Morgan appeared before the Personnel Board. No one told Mr. Morgan to be easy on firemen Evans and Morgan. He did not treat them any differently because they were white (T.C. 289). He tried to make certain the dismissals were upheld. He never considered race at all (T.C. 289). Regardless of race, the case was handled the same way (T.C. 295). To accuse this fine lawyer of taking a dive is not warranted nor supported by the evidence. There is not one reference in the Trial Court's opin-

ion to Mr. Morgan's testimony, to Mr. DeMent's testimony or to Mr. Mandell's testimony. It was completely disregarded.

The testimony of Mr. Randall Morgan, Mr. Ira DeMent, Mr. Howard Mandell, Mr. Ewell Green, Mr. Wade Moss and Mrs. Ed Reid is not disputed. The Trial Court has drawn inferences from the testimony of Mr. Green and Mrs. Reid and from those inferences has determined their legal implication. The Appeals Court is not bound by the rule that the finding of ultimate fact is conclusive unless clearly erroneous. As stated in *Mayo v. Pioneer Bank & Trust Company,* 297 F.2d 392 (5th Cir. 1961):

> "Under Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A. the trial judge's findings of fact are conclusive unless clearly erroneous, but when the factual determination is primarily a matter of drawing inferences from undisputed facts or determining their legal implications, appellate review is far broader than where disputed evidence and questions of credibility are involved. *Mitchell v. Raines,* 5th Cir., 1956, 238 F.2d 186; *Galena Oaks Corporation v. Scofield,* 5th Cir., 1954, 218 F.2d 217."

This Court is not bound by the "clearly erroneous" rule enunciated in 52(a), Federal Rules of Civil Procedure, because that standard of review does not apply to the finding of ultimate fact. In *Phillips v. Joint Legislative Committee,* 637 F.2d 1014, (5th Cir. 1981), the Court stated:

> "In reviewing the merits of the case as to alleged class discrimination, we keep in mind that the District Court's finding of non-discrimination is a determination of ultimate fact to which the 'clearly erroneous' standard of review does not apply."

See also *North River Energy Corp. v. United Mine Workers of America,* (D.A.Ala. 1981, 664 F.2d 1184, 1982) where the Eleventh Circuit Court of Appeals stated the Court is free to make an independent determination of the ultimate fact guided by the trial court's determination of subsidiary facts which are not themselves clearly erroneous. *United States v. Wiring, Inc.,* 646 F.2d 1037, 1041 (5th Cir. 1981).

CONCLUSION

The Courts below have completely failed to consider that the City treated these people exactly alike. When the white firefighters were convicted of a felony they were discharged even though there were mitigating circumstances surrounding their offense. When they appealed to the independent quasi-judicial body that was created by the legislature to hear such appeals, the City fought for their discharge. The City Attorney did all he could to sustain the dismissals. Over the City's objections the City-County Personnel Board ordered them rehired. There is no appeal allowed the employee nor the City.

When the Tate Williams matter came along twenty seven months later the City acted consistently and discharged him after conviction of a serious felony. He appealed his discharge. The City fought for his dismissal also. He offered nothing to give the Board a reason why he should be reinstated. His discharge was sustained by the Board. The Courts below held the *City,* Mayor and Fire Chief liable stating their reason in the first opinion in a footnote: "The Board handles employment matters for the City and County of Montgomery." In the corrected opinion the Appeals Court cited no case but did refer to Schlei & Grossman, *Employment Discrimination Law.* The corrected opinion also held the Board was the 'employer' by virtue of the agency relationship because the City had delegated control of some of the employer's traditional rights such as hiring and firing to the Board. What the Appeals Court overlooks is the legislature, not the City, set up the City-County Personnel Board. The City does not and should not control the Board.

The effect of the holding of agency is of great concern to the City. In one sentence the City becomes liable for any action taken by a Board over which the City has no control nor right to Control. The lower courts did not address the fact that the Board is an independent body and the City has not and should not exercise any control over them. The precedent set by this case is staggering.

What can the City do to assure that whatever action the Board takes will be non-discriminatory. Can the City discharge the Board members? Can the City dictate how the Board decides its cases? Can the City place Board members on leave or suspend them? Can the City withhold funds from the Board? Can the City require the Board to decide a case a certain way? The answer to all these questions is no.

It is most important that this Court hear this case. The lower courts make the City liable for actions over which it has absolutely no control. The lower courts put the City in the position of being the alter ego of an independent board. Consider for instance, a black who is convicted of murder and is fired by the City. He appeals to the City-County Personnel Board and the appeal is denied. The City is liable because the Board does not reinstate him. Reasons are irrelevant according to the lower courts. Surely this is not the result intended by any court.

The Personnel Board is not the agent of the City when it hears appeals from actions of the City. The Board agrees or disagrees. If the Board is the City's agent, then the employee is appealing a decision to an agent of one that made the decision. The Board may control access to employment opportunities within the City but it is not the agent of the City when it hears appeals from City actions by employees who deem themselves aggrieved. If the Board is the agent of the City then the entire appeal procedure set up for City employees is suspect. It is elementary law that for there to exist a master principal relationship the master must have the right to control the manner the business is done and the result to be accomplished. *General Exchange Insurance v. Findlay,* 219 Ala. 193, 121 So. 710. The Board by its creation is an independent entity not controlled by the City. The undisputed evidence established this and the act creating the Personnel Board so states. Act 2280, 1971 Regular Session Alabama Legislature.

The City, the Mayor, and the Fire Chief who have not discriminated earnestly plead that the far reaching decision of the lower courts be reviewed by this Court.

Respectfully submitted,

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APPENDIX A

Tate WILLIAMS, Plaintiff-Appellee,

v.

The CITY OF MONTGOMERY, et al.,
Defendants-Appellants.

No. 82-7370.

United States Court of Appeals, Eleventh Circuit.

May 3, 1984.

Black fire fighter brought action claiming that defendants, by terminating his employment because he received felony conviction, denied him equal protection of the law and that defendants by their actions discriminated against him on account of his race. The United States District Court for the Middle District of Alabama, Myron H. Thompson, J., 550 F.Supp. 662, found that equal protection claim and non-Title VII claim were time barred, but rendered judgment in favor of fire fighter on his Title VII claim. Defendants appealed. The Court of Appeals held that: (1) justifications offered by city and personnel board for firing black fire fighter after felony conviction and refusing to reinstate him on appeal, while having previously reinstated two white fire fighters fired after felony convictions, were purely speculative and, therefore, insufficient to establish such legitimate, nondiscriminatory reason for firing black fire fighter as would meet prima facie case of racial discrimination; (2) city and personnel board both fell within Title VII prohibition against discrimination by employers; (3) personnel board members were not entitled to absolute immunity, or to good-faith immunity; and (4) city and personnel board were not entitled to jury trial on Title VII claim for back pay.

Affirmed.

1. Civil Rights

Justifications offered by city and personnel board for firing black fire fighter after felony conviction and refusing to reinstate him on appeal, though having previously reinstated two white fire fighters fired after felony convictions, were purely subjective and, therefore, insufficient to establish such legitimate, nondiscriminatory reason for the firing as would meet fire fighter's prima facie case of racial discrimination. Civil Rights Act of 1964, §§ 701-718, as amended, 42 US.C.A. §§ 2000e to 2000e-17.

2. Civil Rights

Title VII definition of employer is to be accorded liberal construction. Civil Rights Act of 1964, § 701 (b), as amended, 42 U.S.C.A. § 2000e (b).

3. Civil Rights

Because it employed more than 15 people and was engaged in industry affecting commerce, city was "employer" for purposes of Title VII. Civil Rights Act of 1964, § 701 (b), as amended, 42 U.S.C.A. § 2000e (b).

See publication Words and Phrases for other judicial constructions and definitions.

4. Civil Rights

City personnel board which controlled access to employment opportunities within city was therefore agent of city for those purposes and, thus, fell within Title VII prohibition against discrimination. Civil Rights Act of 1964, § 701 (b), as amended, 42 U.S.C.A. § 2000e (b).

5. Civil Rights

City personnel board members were not entitled to absolute immunity against back pay award in black fire fighter's Title VII action, since, by nature of members' appointment and pro-

ceedings before the board, safeguards normally inhering in judicial process were absent. Civil Rights Act of 1964, § 706 (g), as amended, 42 U.S.C.A. § 2000e-5 (g).

6. Civil Rights

City personnel board members were not entitled to good-faith immunity from award of back pay in favor of black fire fighter in Title VII action, since reasonable person would have known that reinstatement of two white fire fighters convicted of felony while black fire fighter was fired for being convicted felon would violate black fire fighter's constitutional rights because of policy mandating firing of all fire fighters convicted of felony. Civil Rights Act of 1964, §§ 701-718, 706 (g) as amended, 42 U.S.C.A. §§ 2000e to 2000e-17, 2000e-5 (g).

7. Federal Civil Procedure

City and personnel board were not entitled to jury trial on Title VII claim, where plaintiff, a black fire fighter, requested back pay, which is an equitable remedy not requiring determination by jury. Civil Rights Act of 1964, §§ 701-718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17.

Appeal from the United States District Court for the Middle District of Alabama.

Before KRAVITCH, JOHNSON and HATCHETT, Circuit Judges.

PER CURIAM:

We determine whether the district court, 550 F.Supp. 662, erred in holding that appellants, the City of Montgomery, its mayor, its fire chief, and the Montgomery City-County Personnel Board and its members, discriminated against Tate Williams, a City fire fighter. We affirm.

The City of Montgomery, Alabama's (City) fire department policy required the discharge of any fire fighter convicted of a

felony. In August, 1976, two white fire fighters were convicted of a felony, and the fire department discharged them. The employees, however, appealed their dismissals to the Montgomery City-County Personnel Board (Board), and the Board reinstated them.[1] In November, 1979, Tate Williams, the appellee, a black fire fighter, was convicted of a felony. The fire department dismissed him, and he was not reinstated by the Board. Williams filed a complaint with the Equal Employment Opportunity Commission and the Commission issued him a "Right to Sue" notice. Williams then sued the City, the Board, and other appellants in district court seeking reinstatement to his job and backpay.

Relying on the three-tier analysis articulated in *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), the district court ruled that the City and the Board had discriminated against Williams in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e-2000e-17 (West 1981). The court held that the permanent dismissal of Williams, a black fire fighter convicted of a felony, and the dismissal, but reinstatement of the two white fire fighters also convicted of a felony constituted discrimination.

First, the district court held that Williams had fulfilled his burden of establishing a prima facie case of racial discrimination by a preponderance of the evidence. *Burdine,* 450 U.S. at 252-53, 101 S.Ct. at 1093. Second, the district court concluded that the Board and the City had failed to rebut Williams's prima facie case by showing a "legitimate, nondiscriminatory reason" for Williams's permanent dismissal. *Id.* at 252-55, 101 S.Ct. at 1093-94. *See also United States Postal Service Board of Governors v. Aikens,* ____ U.S. ____, 103 S.Ct. 1478, 75 L.Ed. 2d 403 (1983). The district court held that the Board and the City had discriminated against Williams because of his race and, therefore, reinstated him to his job and awarded him backpay.

[1]The Board handles employment matters for the City and the County of Montgomery.

The Board and the City contend that the district court erred in finding that they had discriminated against Williams because of his race. Whether the district court ruling is correct is the easy issue we decide. The district court correctly applied the *Burdine* analysis to this case and its ruling on the issue of discrimination is not clearly erroneous. *Bell v. Birmingham Linen Service,* 715 F.2d 1552, 1557 (11th Cir. 1983); *Harris v. Birmingham Board of Education,* 712 F.2d 1377, 1384 (11th Cir. 1983). The City's and the Board's justifications for firing Williams but retaining the two white fire fighters were purely subjective and, therefore, insufficient to establish a "legitimate, nondiscriminatory reason" for firing Williams.[2]

The City and the Board also contend they are not an employer or an employment agency within Title VII and, therefore, are not liable under Title VII. The district court determined that the City is an employing authority within the meaning of Title VII, and the Board is an agent of the City. Therefore, the district court concluded that Title VII applied to the City and the Board.

Title VII defines employer as a "person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such person." 42 U.S.C.A. § 2000e(b).[3] This definition is to be accorded a liberal construction. *Quijano v. University Federal Credit Union,* 617 F.2d 129, 131 (5th Cir. 1980). Because it employs more than fifteen people and is "engaged in an industry affecting commerce," the City constitutes an "employer"

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[2]The City and the Board submitted that the white fire fighters' offenses were less serious than Williams's offense and that the white fire fighters received more support from the fire department than did Williams. Besides being subjective, these reasons are irrelevant. The policy requiring the discharge of a fire fighter convicted of a felony was mandatory.

[3]Title VII defines a person as "one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organization, trustees, trustees in cases under Title XI, or receivers." 42 U.S.C.A. § 2000e(a).

for purposes of Title VII. *Dumas v. Town of Mt. Vernon, Alabama,* 612 F.2d 974, 979 (5th Cir. 1980) (the Town of Mt. Vernon is an industry affecting commerce). Since the Board controls access to employment opportunities within the City, it is an agent of the City for those purposes and, therefore, falls within Title VII's prohibition against discrimination. *Sibley Memorial Hospital v. Wilson,* 488 F.2d 1338, 1340-41 (D.C. Cir. 1973) (access to job market is a critical factor in discerning Title VII's coverage).

The district court also rejected the Board's contention that it is entitled to either absolute immunity or qualified immunity against the backpay award.

Title VII permits the district court to undertake any affirmative action, including backpay, to halt an employer's discriminatory employment practices. 42 U.S.C.A. § 2000e-5(g). The Fifth Circuit only allows backpay awards against employers in their official capacities. *Clanton v. Orleans Parish School Board,* 649 F.2d 1084, 1099 (5th Cir. 1981). The district court adhered to the Fifth Circuit rule by granting the backpay award against the board members in their official capacities only. The Board and the City, however, cite *Butz v. Economou,* 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), to support their proposition that they are entitled to absolute immunity.

In *Butz,* the Supreme Court held that federal hearing examiners are absolutely immune from suits for damages. *Id.* at 512-13, 98 S.Ct. at 2913-14. The Court based its decision on the similarity between the federal agency process and the judicial process. The board members contend that the Board's process is so similar to a judicial process that they are also entitled to absolute immunity. This contention lacks merit.

The board members are not insulated from political influence. The City, the county, and the judges of the county appoint board members for a limited time. The Board does not record its proceedings unless a party requests it. No judicial review of the Board's decisions exists; therefore, the safeguards present in a federal agency hearing do not exist in the Board's hearings. The board members are not entitled to absolute im-

munity.[4] Moreover, *Butz* involved a claim for personal damages against government officials.

Finally, the City and Board contend that they are entitled to a jury trial. The district court's decision holding that the City and Board were not entitled to a jury trial is correct. Williams requested backpay which is an equitable remedy not requiring determination by a jury. The Board and the City, therefore, are not entitled to a jury trial on the Title VII claim. *Harkless v. Sweeny Independent School District,* 427 F.2d 319, 323-24 (5th Cir.), *cert. denied,* 400 U.S. 991, 91 S.Ct. 451, 27 L.Ed.2d 439 (1971); *Johnson v. Georgia Highway Express, Inc.,* 417 F.2d 1122, 1124-25 (5th Cir. 1969), *vacated on other grounds,* 488 F.2d 714 (5th Cir. 1974). For the foregoing reasons, the decision of the district court is affirmed.

AFFIRMED.

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[4]The Board's good-faith immunity claim must also fail. Government officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). While this standard applies to personal damages and the instant case involves damages to officials in their official capacity, the board members still fail to meet this standard. A reasonable person would know that the reinstatement of two white fire fighters convicted of a felony while a black fire fighter was fired for being a convicted felon would violate the black fire fighter's constitutional rights because of the policy mandating the firing of *all* fire fighters convicted of a felony. *See Scott v. Dixon,* 720 F.2d 1542, 1547 (11th Cir. 1983).

Tate WILLIAMS, Plaintiff-Appellee,

v.

The CITY OF MONTGOMERY, et al.,
Defendants-Appellants.

No. 82-7370.

United States Court of Appeals, Eleventh Circuit.

May 3, 1984.

Black fire fighter brought action claiming that defendants, by terminating his employment because he received felony conviction, denied him equal protection of the law and that defendants by their actions discriminated against him on account of his race. The United States District Court for the Middle District of Alabama, Myron H. Thompson, J., 550 F.Supp. 662, ruled that city and city-county personnel board and its members discriminated against such fire fighter, and defendants appealed. The Court of Appeals held that: (1) subjective justification for firing such fire fighter and retaining two white fire fighters were insufficient to establish legitimate, nondiscriminatory reason for firing; (2) city was "employer" for Title VII purposes; (3) board was agent for city for Title VII purposes; (4) board was not entitled to absolute or qualified immunity against back pay award; and (5) city and board were not entitled to jury trial.

Affirmed.

1. Civil Rights

City's and city-county personnel board's subjective justifications for firing black fire fighter who had been convicted of felony but retaining two white fire fighters who had been convicted of felonies were insufficient to establish legitimate nondiscriminatory reason for firing such black fire fighter. Civil Rights Act of 1964, §§ 701 to 718, as amended, 42 U.S.C.A. §§ 2000e to 2000e-17.

2. Civil Rights

Title VII definition of employer as "person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such person" is to be accorded liberal construction. Civil Rights Act of 1964, § 701 (b), as amended, 42 U.S.C.A. § 2000e (b).

3. Civil Rights

City was "employer" for purposes of Title VII where it employed more than 15 people. Civil Rights Act of 1964, § 701 (b), as amended, 42 U.S.C.A. § 2000e (b).

4. Civil Rights

Where city-county personnel board exercised functions judicially exercised by employer, board was agent of employer city for purposes of Title VII. Civil Rights Act of 1964, § 701 (b), as amended, 42 U.S.C.A. § 2000e (b).

5. Civil Rights

City-county personnel board members were not entitled to absolute immunity against Title VII back pay award where such members were not insulated from political influence, were appointed for limited time, board proceedings would be recorded only upon party's request and no judicial review of board's decision existed. Civil Rights Act of 1964, § 706 (g), as amended 42 U.S.C.A. § 2000e-5 (g).

6. Civil Rights

City-county personnel board members did not have good-faith immunity against Title VII back pay award where board, with full knowledge of mandatory policy dismissing all fire persons convicted of felony, followed policy in case of black but not in case of white fire fighters and failed to offer legiti-

mate, nondiscriminatory reasons for such action. Civil Rights Act of 1964, § 706 (g), as amended 42 U.S.C.A. § 2000e-5 (g).

7. Federal Civil Procedure

City and city-county personnel board were not entitled to jury trial in former fire fighter's Title VII back pay action. Civil Rights Act of 1964, §§ 701 to 718, as amended, 42 U.S. C.A. §§ 2000e to 2000e-17.

Appeals from the United States District Court for the Middle District of Alabama.

CORRECTED OPINION

Before KRAVITCH, JOHNSON and HATCHETT, Circuit Judges.

PER CURIAM:

We determine whether the district court, 550 F.Supp. 662, erred in holding that appellants, the City of Montgomery, its mayor, its fire chief, and the Montgomery City-County Personnel Board and its members, discriminated against Tate Williams, a City fire fighter. We affirm.

The City of Montgomery, Alabama's (City) fire department policy required the discharge of any fire fighter convicted of a felony. In August, 1976, two white fire fighters were convicted of a felony, and the fire department discharged them. The employees, however, appealed their dismissals to the Montgomery City-County Personnel Board (Board), and the Board reinstated them.[1] In November, 1979, Tate Williams, the appellee, a black fire fighter, was convicted of a felony. The fire department dismissed him, and he was not reinstated by the Board. Williams filed a complaint with the Equal Employment Opportunity Commission and the Commission issued him a

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[1]The Board handles employment matters for the City and the County of Montgomery.

"Right to Sue" notice. Williams then sued the City, the Board, and other appellants in district court seeking reinstatement to his job and backpay.

Relying on the three-tier analysis articulated in *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), the district court ruled that the City and the Board had discriminated against Williams in violation of Title VII of the Civil Rights Act of 1964, 42 U.S. C.A. §§ 2000e-2000e-17 (West 1981). The court held that the permanent dismissal of Williams, a black fire fighter convicted of a felony, and the dismissal, but reinstatement of the two white fire fighters also convicted of a felony constituted discrimination.

First, the district court held that Williams had fulfilled his burden of establishing a prima facie case of racial discrimination by a preponderance of the evidence. *Burdine,* 450 U.S. at 252-53, 101 S.Ct. at 1093. Second, the district court concluded that the Board and the City had failed to rebut Williams's prima facie case by showing a "legitimate, nondiscriminatory reason" for Williams's permanent dismissal. *Id.* at 252-55, 101 S.Ct. at 1093-94. *See also United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed. 2d 403 (1983). The district court held that the Board and the City had discriminated against Williams because of his race and, therefore, reinstated him to his job and awarded him backpay.

The Board and the City contend that the district court erred in finding that they had discriminated against Williams because of his race. Whether the district court ruling is correct is the issue we must decide. The district court correctly applied the *Burdine* analysis to this case and its ruling on the issue of discrimination is not clearly erroneous. *Bell v. Birmingham Linen Service,* 715 F.2d 1552, 1557 (11th Cir. 1983); *Harris v. Birmingham Board of Education,* 712 F.2d 1377, 1384 (11th Cir. 1983). The City's and the Board's justifications for firing Williams but retaining the two white fire fighters were

purely subjective and, therefore, insufficient to establish a "legitimate, nondiscriminatory reason" for firing Williams.[2]

The City and the Board also contend they are not an employer or an employment agency within Title VII and, therefore, are not liable under Title VII. The district court determined that the City is an employing authority within the meaning of Title VII, and the Board is an agent of the City. Therefore, the district court concluded that Title VII applied to the City and the Board.

Title VII defines employer as a "person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such person." 42 U.S.C.A. § 2000e(b).[3] This definition is to be accorded a liberal construction. *Quijano v. University Federal Credit Union,* 617 F.2d 129, 131 (5th Cir. 1980). Because it employs more than fifteen people and is "engaged in an industry affecting commerce," the City constitutes an "employer" for purposes of Title VII. *Dumas v. Town of Mt. Vernon, Alabama,* 612 F.2d 974, 979 (5th Cir. 1980) (the Town of Mt. Vernon is an industry affecting commerce).

"Where the employer has delegated control of some of the employer's traditional rights, such as hiring or firing, to a third party, the third party has been found to be an 'employer' by virtue of the agency relationship." Schlei & Grossman, *Employment Discrimination Law* at 1002 (2d ed. 1983). Alabama Act No. 2284 grants the Board rights traditionally reserved to the employer:

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[2]The City and the Board submitted that the white fire fighters' offenses were less serious than Williams's offense and that the white fire fighters received more support from the fire department than did Williams. Besides being subjective, these reasons are irrelevant. The policy requiring the discharge of a fire fighter convicted of a felony was mandatory.

[3]Title VII defines a person as "one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organization, trustees, trustees in cases under Title XI, or receivers." 42 U.S.C.A. § 2000e(a).

Section 2 (f) To establish, after consultation with the governing body of municipalities and the elective officials of the county, coming within the provisions of the Act, a pay plan for all employees in the classified service. . . .

. . . .

Section 5 (a) The preparation, installation, revision and maintenance of a position classification plan covering all positions in the competitive service.

(b) the formulation of minimum standards and qualifications for each class of position.

. . . .

(f) the evaluation of employees during the probationary period.

(g) the transfer, promotion, demotion and reinstatement of employees in the competitive service, provided that no person shall be transferred, promoted or demoted without the approval of the officer in whom the power to make the appointment is vested by law.

The above regulations illustrate the Board's power to exercise duties traditionally reserved to the employer: establishing a pay plan, formulating minimum standards for jobs, evaluating employees, and transferring, promoting, or demoting employees. These functions are traditionally exercised by an employer, but the Board utilizes these powers in the instant case; and, therefore, the Board is an agent of the City for purposes of Title VII.

The district court also rejected the Board's contention that it is entitled to either absolute immunity or qualified immunity against the backpay award.

Title VII permits the district court to undertake any affirmative action, including backpay, to halt an employer's discriminatory employment practices. 42 U.S.C.A. § 2000e-5 (g). The Fifth Circuit only allows backpay awards against employers in their official capacities. *Clanton v. Orleans Parish School Board,* 649 F.2d 1084, 1099 (5th Cir. 1981). The district court adhered to the Fifth Circuit rule by granting the backpay

award against the board members only in their official capacities. The Board and the City, however, cite *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), to support their proposition that they are entitled to absolute immunity.

In *Butz*, the Supreme Court held that federal hearing examiners are absolutely immune from suits for damages. *Id.* at 512-13, 98 S.Ct. at 2913-14. The Court based its decision on the similarity between the federal agency process and the judicial process. The board members contend that the Board's process is so similar to a judicial process that they are also entitled to absolute immunity. This contention lacks merit.

The board members are not insulated from political influence. The City, the county, and the judges of the county appoint board members for a limited time. The Board does not record its proceedings unless a party requests it. No judicial review of the Board's decisions exists; therefore, the safeguards present in a federal agency hearing do not exist in the Board's hearings. The board members are not entitled to absolute immunity.[4] Moreover, *Butz* involved a claim for personal damages against government officials.

Finally, the City and Board contend that they are entitled to a jury trial. The district court's decision holding that the City and Board were not entitled to a jury trial is correct. Williams requested backpay which is an equitable remedy not requiring determination by a jury. The Board and the City, therefore, are not entitled to a jury trial on the Title VII claim. *Harkless v. Swenny Independent School District*, 427 F.2d 319, 323-24 (5th Cir.), *cert. denied*, 400 U.S. 991, 91 S.Ct. 451, 27 L.Ed.2d 439 (1971); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124-25 (5th Cir. 1969), *vacated on other grounds*, 488 F.2d 714 (5th Cir. 1974). For the foregoing reasons, the decision of the district court is affirmed.

AFFIRMED.

[4]Good faith immunity cannot exist when the Board, with full knowledge of the mandatory policy dismissing all fire persons convicted of a felony, followed the policy in the case of a black, but not in the case of a white, and failed to proffer legitimate, nondiscriminatory reasons for such action.

APPENDIX B

Act No. 2280 S. 478—Pierce, Jones

AN ACT

Creating and establishing a county-wide personnel system for all counties of the State of Alabama having a population of not less than 150,000 people and not more than than 180,000 people and for municipalities in such counties having a population of 5,000 or more people, all according to the last or any subsequent Federal Census; providing for a personnel department to be composed of a personnel board and a personnel director; providing for the composition, powers, duties, functions and expenses of the Board and for the selection and compensation of its members; providing for the continued service of any board presently serving under any prior Act of the Legislature; providing for the selection, powers, duties and compensation of the personnel director; to require certification of county, municipal, public corporation, board and commission payrolls; making it a misdemeanor to violate the provisions of the Act; repealing all laws or parts of laws inconsistent with the provisions hereof; and providing for an effective date of this Act.

Be It Enacted by the Legislature of Alabama:

Section 1. (a) In each county of the State which has a population of not less than 150,000 people and not more than 180,000 people, according to the last or any subsequent Federal Census, there is hereby created and established a personnel department for the government and control of all employees and appointees holding positions in the classified service, as defined in Section 4, of each such county and in all municipalities in each such county having

a population of 5,000 or more people according to the last or any subsequent Federal Census.

(b) The Personnel Department shall consist of a Personnel Board and a Personnel Director. The Personnel Board shall consist of three members with six year terms, to be appointed in the following manner: one by the governing body of the county, one by the governing body of the municipality therein having the greatest population at the time of such appointment according to the most recent Federal Census, and one by a majority of the circuit judges and probate judge of the county. At the expiration of the term of each member, his successor shall be appointed for a term of six years by the authority appointing the member whose term has expired; provided, however, that any personnel board appointed pursuant to the provisions of any prior acts of the Legislature affecting such counties and municipalities affected by the provisions of this Act, shall continue to serve as the personnel board under the provisions of this Act until the expiration of their respective terms under the prior acts of the Legislature. Vacancies on the Board shall be filled for the unexpired term by the authority appointing the vacating member.

(c) The members of the Board shall be qualified electors of the county. No person shall be appointed to the Board who holds any salaried public office or employment, nor shall any member, while a member of the Board or for a period of one year after he has ceased for any reason to be a member, be eligible for appointment to any salaried office or employment in the service of the county or municipality or any county or municipal elective office.

(d) The Board shall hold one regular meeting each month and such special meetings as it shall deem necessary. The members of the Board shall receive twenty-five

dollars ($25) per diem for each meeting of the Board they attend.

Section 2. The members of the Board shall elect one of their number as chairman. The Board shall determine the order of business for the conduct of its meetings and shall meet on the call of the chairman or two of the members. Two members of the Board shall constitute a quorum for the transaction of business. The functions of the Board shall be:

(a) To formulate and promulgate a set of rules to supplement this Act and revisions and amendments thereof.

(b) To act in an advisory capacity to the governing bodies of the county and municipality on problems concerning personnel administration.

(c) As provided by this Act and by rule, to hear and decide appeals submitted by any person in the competitive service relative to any situation connected with his employment status or condition of employment.

(d) In any investigation or hearing conducted by the Board, it shall have the power to examine witnesses under oath and compel their attendance or the production of evidence before it by subpoenas issued in the name of county or municipality. Each member of the Board shall have the power to administer oaths to witnesses.

(e) To hold hearings on and adopt or revise the position classification plan. The Board shall adopt a position classification plan and class specifications and revisions thereof, allocate and reallocate positions in the competitive service to classes.

(f) To establish, after consultation with the governing body of the county and the governing body of municipalities and the elective officials of the county, coming within the provisions of this act, a pay plan for all employees in the classified service. Such pay plan shall include, for each

class of positions, a minimum and a maximum rate or rates as may otherwise in specific instances be fixed by law and such intermediate rates as may be deemed necessary or advisable by the Personnel Board.

Section 3. (a) The Personnel Board shall appoint a Personnel Director whose duty it shall be to act in the capacity of director for the Personnel system. He shall act as secretary at Board meetings, and shall be the Board's executive officer, but shall not have a vote in determining the Board's policy. He shall perform such duties as are assigned to him by the Board. The compensation of the Director shall be fixed by the Board at a sum not to exceed the maximum rate adopted for classified employees who serve as department heads or as the administrative officers for a department. The Director shall:

(1) Attend all meetings of the Personnel Board.

(2) Administer all provisions of this Act and the rules established hereunder, not specifically reserved to the Personnel Board.

(3) Under the directions of the Board, prepare rules, and revisions and amendments thereof for the consideration of the Board.

(4) Under the direction of the Board, prepare a position classification plan and class specifications and provisions thereof, for the consideration of the Board.

(b) The Director shall recommend to the Board and the Board shall establish, after consultation with the governing body of the county and the governing body of municipalities and the elective officials of the county, coming within the provisions of this Act, a pay plan for all exempted or unclassified employees except:

Officials elected by popular vote and, in case of death, resignation, or removal, their legal substitutes.

Members of appointive boards, commissions or committees.

Employees appointed or employed by the county or city board of education.

Persons in the "Classified Service" within the meaning of and subject to the State of Alabama Merit System under any present or future law, and so long as any such law remains effective and any person whose employment is subject to the approval of the United States Government or any agency thereof.

The Register of the Circuit Court, and the bailiff and court reporter appointed by each judge of the Circuit Court.

Any employee receiving his compensation from any elected official.

Attorneys, physicians, surgeons and dentists who serve part time, excepting the City Recorder and City Prosecutor.

The County Agent, Assistant County Agent, Home Demonstration Agent and Assistant Home Demonstration Agent.

Section 4. The provisions of this Act shall apply to all officers and employees in the service of the county and affected municipalities, except:

(a) Elective officials. Provided however, that in the event the status of an elective officer of the county or municipality is changed to that of an appointive officer, then at the expiration of the term of office of any such officer, the person holding the office at the time of the expiration of the term, providing that he shall have served in such position for a period of at least six months continuously, immediately prior to the expiration of the term of office, shall assume regular status in the competitive service without preliminary examination or working tests and shall thereafter be subject in all respects to the provisions of this Act.

(b) Members of appointive boards, commissions, and committees.

(c) All employees or appointees of the city or county board of education, or persons engaged in the profession of teaching or in supervising teaching in the public schools; excepting, however, personnel employed in kindergartens or schools not a part of the city or county school system operated under the direction and supervision of the city or county board of education.

(d) Common laborers.

(e) Attorneys, physicians, surgeons and dentists who, with the express or implied permission of any appointing authority or of the county or municipality, hold themselves out for employment by others in the same or a like line of work as that performed by them for such appointing authority; excepting, however, municipal recorders or assistant recorders and city or municipal prosecutors or assistant city or municipal prosecutors.

(f) The personnel director provided for by this Act.

(g) Persons in the "classified service" within the meaning of and subject to the State of Alabama merit system under any present or future law, and so long as any such law remains effective.

(h) One private secretary or executive assistant of a member of the governing body of such municipality, the bailiff appointed by each judge of the circuit court, and two clerks to be designated by each county elective official and also the Register of the Circuit Court except the member of the Board of Revenue; and any employee receiving his compensation from any elected official of the county.

Offices, positions and employments not exempted above shall constitute the competitive or classified service of the county and affected municipalities. It is intended hereby to include within the competitive or classified service all offices, positions and employments in each such county and any such municipalities therein as these offices, positions

and employment now exist, or as they may hereafter exist, the holders of which are paid, whether by salaries, wages and fees, in whole or in part from funds or any such county or municipality, or the holders of which receive their compensation from any elected official and perform duties pertaining to the office of such elected official or officer except those hereinabove numerated in this Section. It is also intended hereby that the competitive or classified service shall include all personnel of any public corporation, board, committee, or commission, appointed or created by the governing body of any such county or municipality whether the salaries, wages or compensation of such officers or employees are paid directly by such county or municipality; provided, however, the appointed members of any such public corporation, board, committee or commission shall not be included in the competitive or classified service.

(i) One clerk, deputy or employee to be named by the Clerk of the Circuit Court for his office, and one clerk, deputy or employee to be named by the Register of the Circuit Court for his office.

Section 5. In addition to such other matters as may be necessary and proper to carry out the intent and purposes of this Act, rules shall be formulated and adopted by the Personnel Board establishing specific procedures to govern the following phases of the personnel program:

(a) The preparation, installation, revision and maintenance of a position classification plan covering all positions in the competitive service.

(b) The formulation of minimum standards and qualifications for each class of position.

(c) The public announcement of vacancies and examinations and the acceptance of applications for employment.

(d) The preparation and conduct of examinations and the establishment and use of employment lists containing names of persons eligible for appointment.

(e) The certification and appointment of persons from employment lists to fill vacancies and the making of temporary and emergency appointments.

(f) The evaluation of employees during the probationary period.

(g) The transfer, promotion, demotion and reinstatement of employees in the competitive service, provided that no person shall be transferred, promoted or demoted without the approval of the officer in whom the power to make the appointment is vested by law.

(h) The separation from the service of employees through layoff, suspension, dismissal, and for incapacity to perform required duties.

(i) The standardization of hours of work, attendance and leave, regulations, working conditions, and the development of employee morale, welfare and training. Provided, that no rule or regulation shall prohibit or prevent any employee from working over-time should it be necessary in the public interest in the opinion of the officer in whom the power to make appointments is vested by law; however, any employee who works overtime shall be compensated therefor only by overtime pay for any overtime work performed over forty (40) hours per weeks, holidays or beyond the normal tour of duty.

(j) The maintenance and use of necessary records and forms.

Section 6. (a) Appointments to vacant positions in the competitive or classified service shall be made in accordance with the rules established hereunder and from employment lists resulting from competitive examination, or by promotion, transfer, demotion or reinstatement. Ap-

pointments shall be made by the governing body of the county or municipality, or by the officer in whom the power to make appointments is vested by law.

(b) If appointment is to be made from employment or promotional lists, the names of persons willing to accept appointment shall be certified by the Personnel Director in the order in which they appear on the lists. The number of names certified shall exceed by four the number of vacancies to be filled.

(c) In the absence of appropriate employment lists, a temporary appointment may be made by the appointing power of a person meeting the minimum qualifications for the position, provided, however, that an employment list shall be established for such position within ninety days. No person shall be employed under temporary appointment for a total of more than ninety days in any fiscal year. In the event of emergency, the appointing power may appoint such persons as are required to meet the situation but such appointment shall not exceed thirty working days, except in case of a war emergency so declared by an Act of Congress, such appointments may continue until the termination of such emergency.

(d) No credit shall be allowed in the giving of any examination or the establishment of any employment or promotional lists, for service rendered under a temporary appointment.

(e) During the period of suspension of any employee, or pending final action on proceedings to review the suspension, demotion or dismissal of any employee, the vacancy created may be filled by the appointing power only by temporary appointment.

Section 7. (a) All original and promotional appointments shall be for a probationary period of six months during which the employee may be rejected by the appoint-

ing authorities as set out in Section 6 (a) herein at any time without right of appeal or hearing in any manner.

(b) An employee rejected during the probationary period from a position to which he has been promoted shall be reinstated to the position from which he was promoted, unless charges are filed and he is discharged as provided in this Act and the rules.

(c) Any employee in the competitive service promoted or transferred to a position not included in the competitive service shall be reinstated to the position from which he was promoted or transferred if within six months after such promotion or transfer action is taken to dismiss him, unless charges are filed and he is discharged in the manner provided in this Act and the rules established hereunder for positions in the competitive service.

Section 8. (a) Any person holding a position or employment included in the competitive service, who, on the effective date of this Act, shall have served continuously in such position, or in some other position included in the competitive service, for a period of at least six months immedately prior to such effective date, shall assume regular status in the competitive service in the position held on such effective date without preliminary examination or working tests and shall thereafter be subject in all respects to the provisions of this Act.

(b) Any other persons holding positions or employments in the competitive service shall be regarded as holding their positions or employment as probationers who are serving out the balance of their probationary periods before obtaining regular status.

Section 9. The governing bodies of the county and municipality and any officer in whom is vested by law the power to make transfers, promotions, demotions, reinstatements, layoffs, and to suspend or dismiss employees, shall

retain such power, subject to the provisions of this Act and the rules established hereunder, it being the intent and spirit of this Act to provide a fair and just approach to county and municipal employment in order that employees may be selected and promoted on a merit basis, but in no sense to impair the efficiency of the public service.

(b) Any person holding a position or employment in the competitive service shall be subject to suspension without pay by the appointing power and without right of appeal, but such suspension shall not exceed a total of thirty days in any fiscal year.

Section 10. (a) Any employee in the competitive service who has been demoted, dismissed or reduced in pay, shall be entitled to receive a written statement of the reasons for such action within three days, and he shall have three days' time thereafter within which to answer in writing thereto. A copy of such charges and answers shall be filed with the Personnel Director. In the event the employee files an answer, a copy of such written charges and of such answer shall be transmitted by the Personnel Director to the Personnel Board. Within ten days from the date of filing his answer to the written charges, or in the event such written charges have not been made available to him within the time prescribed, then within ten days after the action taken to demote, dismiss or reduce the pay of the employee, he may file a written demand with the Personnel Director requesting a hearing before the Personnel Board. The Board shall then investigate the case and conduct a hearing as provided by this Act and by the rules.

(b) The provisions of this Section and of Section 11 shall not apply to reductions in pay which are part of a general plan to reduce salaries and wages as an economy measure or as a part of a general curtailment program.

Section 11. (a) Any employee in the competitive ser-

vice shall have the right to appeal to the Personnel Board relative to any situation affecting his employment status or conditions of employment except in instances where the right of appeal is prohibited by this Act. Thereupon the Board shall make such investigation as it may deem necessary and within twenty days after the request for hearing was filed by the employee, the Board shall hold a hearing, at which time it shall hear evidence for and against such employee. Hearings may be informally conducted and the rules of evidence need not apply.

(b) Within ten days after concluding the hearing, the Personnel Board shall certify its findings and order to the authority from whose action the appeal was taken. Such official shall then affirm, revoke or modify the action taken so as to conform with the findings and order of the Board. The findings and order of the Personnel Board shall be final and conclusive and shall not be reviewable in any court.

Section 12. Whenever in the judgment of the governing body of the county or municipality or any elected county official it becomes necessary in the interest of economy or because the necessity for any position in its or his department no longer exists, it or he may abolish any position or employment in the competitive service and lay off the employee holding such position or employment without filing written charges and without the right of appeal. The name of such an employee so laid off shall be placed at the top of the appropriate employment list or lists as provided by the rules.

Section 13. (a) No person holding a position in the competitive service shall seek or accept election, nomination or appointment as an officer of a county or municipal political club or organization, or take an active part in, or make any contribution or donation to, any county or

municipal political campaign, or serve as a member of a committee of such club or organization or circle, or seek signatures to any petition provided for by any election law, or act as a worker at the polls, or distribute badges or pamphlets, dodgers, or handbills of any kind favoring or opposing any candidate for election, or for nomination to a public office, whether county or municipal; provided, however, that nothing in this Act shall be construed to prevent any such officer or employee from becoming or continuing to be a member of a political club or organization, or from attendance at a political meeting, or from enjoying entire freedom from all interference in casting his vote or from seeking or accepting election or appointment to a public office.

(b) Any wilful violation of this Section, or violation through culpable negligence, shall be sufficient grounds to authorize the discharge of any person in the competitive service.

Section 14. No officer, agent, clerk or employee, under the government of the county or municipality and no candidate for any county or municipal office shall, directly or indirectly, solicit or receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription or contribution, whether voluntary or involuntary for any political purpose whatsoever, from anyone holding any position in the competitive service under the provisions of this Act.

Section 15. In any matter requiring the services of an attorney, the personnel board may call upon the county or city attorney of any such county or city to render such legal services to the board as it may deem necessary or advisable, or the board may employ independent counsel and the compensation of such independent counsel shall be paid as other employees of the board are paid.

Section 16. The compensation and all other expenses of the Personnel Board, the Personnel Director and all others arising under the provisions hereof, shall be paid by warrants drawn by the Board of Revenue on the General fund of the county. At the end of the county's fiscal year it shall prorate the total sum which it has expended for the purpose of this Act between itself and the municipality subject to this Act, charging each with such part of the total sum so expended as the total number of employees of such county, or municipality, who were subject to the provisions of this Act on the last day of the county's fiscal year, bears to the total number of employees of both county and municipality subject to the provisions of this Act on such last day of the county's fiscal year. The sum so arrived at by the county as the proper contribution of each shall be certified to the Personnel Director and when approved by him in writing, shall become a liability of the municipality and shall be paid immediately to the county. In the event the salaries of a county or municipality are paid in part from different treasuries or different funds, in the same treasury, the liability for this contribution shall accrue against such various treasuries or funds in the same proportion, as the salaries of the employees of the county or municipality are paid therefrom. In the event any contribution levied hereunder shall not be paid within thirty days after approval by the personnel Director, the county may bring suit therefor in any court of competent jurisdiction and any judgment so recovered shall be satisfied from any funds in such treasury or funds against which such contribution levy lies.

Section 17. It shall be unlawful for any county, municipal, public corporation, board or commission, official, officer or employee, or any other fiscal officer, to draw or issue any warrant to the county, municipal, public corporation, board or commission treasury, or county, municipal,

public corporation, board or commission depository, for the payment of any salary or compensation to any person in the county, municipal, public corporation, board or commission service for personal services, unless the payroll, estimate, voucher, or account for such salary or compensation containing the name of the person to be paid shall bear the certification of the head of the department wherein such person works that the person or persons named therein are employees of the county, municipality, public corporation, board or commission and are legally entitled to receive the sums stated therein.

Section 18. Any person who violates any of the provisions of this Act shall be guilty of a misdemeanor.

Section 19. The provisions of this Act are severable. If any part of the Act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Section 20. All laws or parts of laws general, local or special, which conflict with this Act are repealed.

Section 21. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

Approved October 1, 1971.

Time: 1:28 P.M.

APPENDIX C

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE MIDDLE DISTRICT
OF ALABAMA, NORTHERN DIVISION

TATE WILLIAMS, Plaintiff, v. THE CITY OF MONTGOMERY, a municipal corporation; EMORY FOLMAR, individually and in his official capacity as Mayor of the City of Montgomery, Alabama; THE FIRE DEPARTMENT OF THE CITY OF MONTGOMERY; JIM SUTHERLAND, individually and in his official capacity as Chief of the Fire Department of the City of Montgomery; THE MONTGOMERY CITY-COUNTY PERSONNEL BOARD; EWELL GREEN, MRS. ED. REID, and CHARLES B. PATERSON, individually and in their official capacities as members of the Montgomery City-County Personnel Board, Defendants.	)	CIVIL ACTION NO. 81-323-N

JUDGMENT

Pursuant to the memorandum opinion of the court entered this date, it is the ORDER, JUDGMENT, and DECREE of this court:

(1) That the defendants City of Montgomery and its mayor, Emory Folmar, the defendants City of Montgomery Fire Department and its chief, Jim Sutherland, and the defendants Montgomery City-County Personnel Board and its members, Ewell Green, Mrs. Ed Reid, and Charles B. Paterson shall reinstate the plaintiff Tate Williams as a firefighter with the City of Montgomery Fire Department, within fourteen days from the date of this order, with allowance for a reduction in pay and other benefits comparable to that given William V. Morgan when he was reinstated in 1976, but also with such accompanying promotions and retirement and other benefits which the plaintiff Williams would have received had he not been illegally denied reinstatement on January 25, 1980; and that said defendants, in their official capacities, shall pay backpay, determined according to accepted legal principles, to the plaintiff Williams from January 25, 1980, to the time of his reinstatement;

(2) That the plaintiff Williams be and he is hereby allowed fourteen days from the date of this order within which to file his request for reasonable attorney fees, which request shall address each of the criteria set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974);

(3) That all parties to these proceedings be and they are hereby allowed fourteen days to file a request with this court to determine appropriate backpay, should said parties be unable to agree among themselves as to the amount of backpay to which the plaintiff Williams is entitled; and

(4) That all other relief sought by the plaintiff Williams in this case that is not specifically granted be and the same is hereby denied.

It is further ORDERED that all costs of this proceeding be and they are hereby taxed against the defendants in their official capacities, for which execution may issue.

DONE, this the 19th day of October, 1982.

/s/ MYRON H. THOMPSON
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

TATE WILLIAMS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 81-323-N
THE CITY OF MONTGOMERY, a municipal corporation; EMORY FOLMAR, individually and in his official capacity as Mayor of the City of Montgomery, Alabama; THE FIRE DEPARTMENT OF THE CITY OF MONTGOMERY; JIM SUTHERLAND, individually and in his official capacity as Chief of the Fire Department of the City of Montgomery; THE MONTGOMERY CITY-COUNTY PERSONNEL BOARD; EWELL GREEN, MRS. ED. REID, and CHARLES B. PATERSON, individually and in their official capacities as members of the Montgomery City-County Personnel Board,	)	
	)	
Defendants.	)	

OPINION

The plaintiff Tate Williams, a black person, has brought this cause of action claiming, first, that the defendants, by terminating his employment as a fireperson because he

received a felony conviction while retaining two white firepersons also convicted of felonies, denied him equal protection of the law in violation of 42 U.S.C. § 1983; and, second, that the defendants by their actions discriminated against him on account of his race in violation of 42 U.S.C. §§ 2000e, et seq., otherwise known as Title VII of the Civil Rights Act of 1964, as amended, and in violation of 42 U.S.C. §§ 1981, 1983, 1985.[1] The defendants are the City of Montgomery and its mayor, Emory Folmar; the Fire Department of the City of Montgomery and its chief, Jim Sutherland; and the Montgomery City-County Personnel Board and its three members, Ewell Green, Mrs. Ed Reid, and Charles B. Paterson.[2] All of the individual defendants are white persons.

Upon consideration of this case, which was tried before the court without a jury, and for reasons which follow, the court is of the opinion that Williams' first claim, denial of equal protection, is time-barred in full; and that his second claim, discrimination on account of race, is time-barred to the extent it is premised on sections 1981, 1983 and 1985, but is not time-barred and has merit to the extent it is premised on Title VII, thereby entitling Williams to appropriate relief.

I. THE FACTS

During all times relevant, the defendant Montgomery City Fire Department had in effect a policy which required the discharge of any fireperson convicted of a felony. In August 1976, two white firepersons, firefighter William V. Morgan and Lt. Lamar Evans, were convicted, after trial in federal court, of the felony of conspiring to operate,

[1]The jurisdiction of this court is properly invoked pursuant to 28 U.S.C. §§ 1331, 1343 (3) and 42 U.S.C. § 2000e-5 (f) (3).

[2]The Montgomery City-County Personnel Board handles employment matters for both the City and County of Montgomery.

own and conduct an illegal gambling operation in violation of 18 U.S.C. § 371. Morgan was placed on probation for one year and Evans was placed on probation for two years. Although the department's disciplinary board, consisting of several other firepersons, recommended that Morgan and Evans not be terminated, the department's chief at the time, J. A. Odom, rejected the disciplinary board's recommendation and recommended to the director of the City Department of Public Safety, Ed. L. Wright, Jr., and the mayor at the time, Jim Robinson, that both men be discharged. Wright and Robinson accepted Odom's recommendation and Wright mailed Morgan and Evans notices of their dismissal.

Morgan and Evans appealed their dismissal to the defendant Montgomery City-County Personnel Board, which consisted of the defendants Green and Reid and a third member, Thomas M. Tyson, Sr. At the hearing before the board, the Fire Department, while acknowledging that it had an across-the-board policy, did little or nothing to have the policy upheld by the board. The board, therefore, without reviewing the two men's personnel files, but after entertaining testimony from several character witnesses and receiving a letter from the U. S. Attorney recommending that the two men not be terminated, reversed the dismissal of the two men and directed that they both be immediately reinstated without backpay and that Evans be reduced to the rank of a firefighter, with corresponding reduction in pay. It is unclear whether Morgan also suffered a reduction in pay.

Approximately three years later, in November 1979, the plaintiff Williams was convicted, after trial in state court, of the felony of false pretense in violation of § 13-3-92, Code of Alabama 1975, and he was placed on probation for a period of thirteen months. The defendant Sutherland,

who had replaced Odom as chief, recommended to the defendant Folmar, who had replaced Robinson as mayor, that Williams be discharged as a firefighter with the city. Folmar accepted the recommendation and Williams was dismissed on November 14, 1979.

As did Morgan and Evans, Williams appealed his dismissal to the personnel board, which still consisted of the two defendants Green and Reid and Thomas M. Tyson, Sr., who has since left the board and has been replaced by the defendant Paterson. However, unlike in the Morgan and Evans cases, the board on January 25, 1980, sustained Williams' dismissal; but as in the Morgan and Evans cases, it reached its decision without consulting Williams' personnel file.

Williams filed a timely charge with the Equal Employment Opportunity Commission and sometime shortly after March 13, 1981, received a "Notice of Right to Sue Within 90 Days" from the commission. Williams then filed an action in the court on June 10, 1981.

II. THE LAW

As already noted, Williams has two claims against the defendants. The first claim is that the defendants by their actions denied Williams equal protection of the law. *See, e.g., Zeigler v. Jackson,* 638 F.2d 776 (5th Cir. 1981) (the plaintiff's right to equal protection of the law was denied where defendants failed to offer a rational justification for the plaintiff's discharge as a police officer due to his criminal convictions, while three other police officers were retained despite their criminal convictions.)[3] This first

[3]The Eleventh Circuit has adopted as its precedent the decisions of the former Fifth Circuit. *Bonner v. City of Prichard, Alabama,* 661 F.2d 1206 (11th Cir. 1981) (en banc). *See also Stein v. Reynolds Securities, Inc.,* 667 F.2d 33, 34 (11th Cir. 1982) (setting out rules of binding precedent for cases decided after the creation of the Eleventh Circuit).

claim does not involve or turn on Williams' race. The second claim, however, is that the defendants by their actions discriminated against Williams on account of his race. *See, e.g., Brown v. A. J. Gerrard Manufacturing Co.*, 643 F.2d 273 (5th Cir. 1981) (evidence reflected that black employee, discharged for work absences while white employees absent under similar circumstances not discharged, was discriminated against on account of his race.)

The defendants maintain that the first claim, which is premised on section 1983, and the second claim, to the extent it is premised on sections 1981, 1983 and 1985, are barred as not timely filed. The court agrees. Since these sections do not contain any limitations period for filing claims, a court, in considering limitations challenges under these sections, must look to applicable state law; and, further, the Alabama limitations statute applicable to claims brought under these sections is, as the defendants contend, § 6-2-39, Code of Alabama 1975, which contains a one-year limitations period. *Doyle v. University of Alabama in Birmingham,* 680 F.2d 1323, 1325 (11th Cir. 1982) (section 1983); *Rubin v. O'Koren,* 644 F.2d 1023, 1025 (5th Cir. 1981) (section 1983); *Dumas v. Town of Mount Vernon, Alabama,* 612 F.2d 974, 977 (5th Cir. 1980) (sections 1981, 1983 and 1985; *Beards v. Stephens,* 372 F.2d 685, 688-89 (5th Cir. 1967) (section 1985). Williams' contention that Alabama's ten-year limitations statute § 6-2-33 (3), Code of Alabama 1975, governs claims under these sections is without merit. *Nathan Rodgers Construction & Realty Corp. v. City of Saraland, Alabama,* 670 F.2d 16 (5th Cir. Unit B 1982).

Since Williams' claims arose, at the latest on January 25, 1980, when the personnel board sustained his dismissal, and yet this cause of action was not filed until June 10, 1981, more than a year later, his claims under sections

1981, 1983 and 1985 are barred as untimely by section 6-2-39. This result, however, still leaves for the court's consideration Williams' second claim to the extent it is based on Title VII. The defendants do not contend that this claim of racial discrimination under Title VII is barred as untimely and the court, therefore, now turns to and considers the merit in the claim, according to Title VII law.

Proof establishing racial discrimination is seldom direct; rather, in most cases a court must look to surrounding circumstances, circumstantial evidence, to make a determination as to whether a person has been the victim of racial discrimination. Therefore, in *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 254, 101 S.Ct. 1089, 1093 (1981), the Supreme Court set forth the manner in which trial courts should consider claims based on Title VII when the evidence is primarily circumstantial. *Lee v. Russell County Board of Education,* 684 F.2d 769, 774 (11th Cir. 1982). A plaintiff has the initial burden of establishing a prima facie case of racial discrimination by a preponderance of evidence, *Burdine, supra,* 450 U.S. at 254, 101 S.Ct. at 1093, which once established raises a presumption that the plaintiff was discharged by the defendant on racially discriminatory grounds, *id.,* 450 U.S. at 254, 101 S.Ct. at 1094. If the plaintiff establishes a prima facie case, the burden then shifts to the defendant to rebut the presumption by producing sufficient evidence to raise a genuine issue of fact as to whether the defendant discriminated against the plaintiff. This may be done by the defendant articulating a "legitimate, non-discriminatory reason" for the discharge, a reason which is "clear and reasonably specific" and worthy of credence. *Id.,* 450 U.S. at 253, 256, 101 S.Ct. at 1093, 1095-96. The defendant has a burden of production, not one of persuasion, and thus it does not have to persuade a court that it was actually

motivated by the reason advanced. *Id.*, 450 U.S. at 254, 101 S.Ct. at 1094. Once the defendant satisfies this burden of production, the plaintiff then has the burden of persuading a court that the proferred reason for the employment decision is a pretext for racial discrimination. The plaintiff may satisfy this burden by persuading the court either directly that a racially discriminatory reason more than likely motivated the defendant or indirectly that the proferred reason for the discharge is not worthy of belief. *Id.*, 450 U.S. at 256, 101 S.Ct. at 1095. By so persuading the court, the plaintiff satisfies his or her ultimate burden of demonstrating by a preponderance of evidence that he or she has been the victim of intentional racial discrimination. *Id.*

To establish a prima facie case, a plaintiff need only show that he or she is a member of the protected class and was discharged while a similarly situated person outside the class was retained. *See, e.g., Lee v. Russell County Board of Education, supra,* 684 F.2d at 773; *Davin v. Delta Air Lines, Inc.*, 678 F.2d 567, 570 (5th Cir. Unit B 1982); *Rohde v. K. O. Steel Castings, Inc.*, 649 F.2d 317, 322 (5th Cir. 1981); *Brown v. A. J. Gerrard Manufacturing Co., supra,* 643 F.2d at 276; *Turner v. Texas Instruments,* 555 F.2d 1251, 1255 (5th Cir. 1977). Williams has done this. He has shown that he, a black fireperson, was discharged because he was convicted of a felony, while two white firepersons, also convicted of felonies, were not discharged. The issue therefore now before the court is whether the defendants have, in turn, met their burden of production for a reason for his discharge.

It is undisputed that the City of Montgomery Fire Department had an objective, across-the-board policy requiring the discharge of any fireperson convicted of a felony. Nevertheless, in the only three instances in which the

policy has been invoked, the personnel board, which was fully aware of the policy, refused to follow the policy in the cases of two white firepersons, but later strictly imposed the policy in the case of a black fireperson. The defendants proffer two reasons for this difference in results. They submit, first that the white firepersons' offenses were less serious than Williams' and, second, that the two white firepersons received support from the Fire Department. Upon consideration of these reasons and the other evidence presented by Williams and the defendants, the court finds these reasons to be pretextual and is of the opinion that Williams has been the victim of racial discrimination.[4]

Although *Burdine* places on a defendant only a burden of production, the case requires that the defendant's

[4]Personnel board member Reid testified at trial that a third determinative factor was the fact that Morgan and Evans entered guilty pleas to their offenses while Williams was found guilty by a jury. The court notes, however, that in an earlier response to an inquiry as to why Williams was discharged and the two white firemen were not, Reid failed to mention this third reason. *See* Reid deposition, plaintiff's exhibit no. 37. Also, the other board member, Green, never mentioned this third reason, either in deposition or at trial. *See* Green deposition, plaintiff's exhibit no. 36. The court is therefore of the opinion that this third reason was clearly a fabricated afterthought which, if anything, lends support to the conclusion that the other two proffered reasons were pretextual.

Also, the court notes that while Reid claims Morgan and Evans entered guilty pleas and while the person who was U. S. Attorney at the time these two men were charged indicated in a letter that these two men pled guilty, the "judgment and commitment orders" and the "docket sheets" for these two men reflect they did not plead guilty, but rather that they were tried before a court without a jury, after which they were found guilty. *See* plaintiff's exhibit nos. 5 and 14.

Also, Reid noted in a pretrial deposition, introduced at trial, that "[a]ll the testimony before the Personnel Board was to the effect that Morgan and Evans had exemplary records." Plaintiff's exhibit no. 37, p. 7. As to Evans, either the testimony at Evans' hearing before the board was untrue, thereby casting substantial doubt on the vigor with which the City of Montgomery and its officials sought to have upheld Evans' discharge, or Reid failed to present accurately the facts in her deposition; for, the evidence at trial reflected that Evans' record with the Fire Department was far from exemplary. *See* plaintiff's exhibit nos. 21-27. Reid, nevertheless, abandoned this testimony at trial.

proffered reason "be clear and reasonably specific" and worthy of credence. This requirement provides a plaintiff with some protection against the potential for discrimination in subjective personnel criteria, which are a "ready mechanism" for racial discrimination. *Sims v. Montgomery County Commission,* 544 F.Supp. 420, 426 (M.D. Ala. 1982). Therefore, the more subjective the criteria in a defendant's proffered reason, the more difficult will be his or her task in meeting the production burden established in *Burdine. Robbins v. White-Wilson Medical Clinic, Inc.,* 660 F.2d 1064, 1067 (5th Cir. Unit B 1981), *vacated on* other grounds, ... U.S. ....., 102 S.Ct. 2229 (1982).

With these thoughts in mind, the court now assesses the personnel board's reasons for the differing result between the two white firepersons and the black fireperson. As to the first reason, the personnel board and the other defendants have failed to articulate the criteria by which the members of the personnel board decided that one crime necessitated dismissal while another did not; instead, it appear that this determination was left to the unbridled, unguided, subjective discretion of the individual members of the personnel board. Similarly, with regard to the second reason—that the white firepersons had support from the Fire Department—it is totally subjective in nature. *See Lee v. Russell County Board of Education, supra,* 684 F.2d at 775-76 ("Excessively subjective and vague criteria may be insufficient because they do not allow reasonable opportunity to rebut.") Nevertheless, this court refrains from holding that the defendants' proffered reasons are legally insufficient standing alone, because the court is of the opinion that the reasons are legally insufficient when viewed and considered in the context of all the evidence. This is therefore one of the "cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's

explanation." *Burdine, supra,* 450 U.S. at 255 n.10, 101 S.Ct. at 1095 n.10. *See also Robbins v. White-Wilson Medical Clinic, Inc., supra,* 660 F.2d at 1067.

This other evidence consists of, first, the fact that it was not until after Williams initiated his claims that the personnel board members articulated, let alone adopted, the criteria which they now claim they used in reaching their decision to overturn the discharge of the two white firepersons and uphold Williams', a fact which supports Williams' contention that the criteria, while perhaps descriptive of differences between him and the two white firepersons, were actually not determinative of the outcome of the two cases. Secondly, because the board members never articulated the criteria before Williams initiated his claims, Williams was never aware of the criteria and their possible application to him. And third, the board members completely failed to consult any of the three convicted firepersons' personnel files, with the result that their decision was unsupported and unrelated to any concrete, more objective evidence, such as would ordinarily be found and reflected in personnel files, of the character of these three firepersons and their ability to perform and meet departmental standards; instead, the board members relied on such secondary and extremely subjective evidence as the opinion of the two white firepersons' fellow employees, while faulting Williams for failing to engender similar support. *Cf. Lee v. Conecuh County Board of Education,* 634 F.2d 959, 963 (5th Cir. 1981), *quoting from Crawford v. Western Electric Co.,* 614 F.2d 1300, 1315 (5th Cir. 1980) ("employer may not utilize wholly subjective standards by which to judge its employees' qualifications and then plead lack of qualifications when its promotion process . . . is challenged as discriminatory") (emphasis added). *Cf. also Watson v. National Linen Service,* No. 81-5658, slip op., p. 2828, 2832 (11th Cir. September 20,

1982) (per curiam) ("The failure to establish 'fixed or reasonably objective standards and procedures for hiring' is a discriminatory practice.") It should be added that at the time Williams was asked to engender such co-employee support, the Fire Department had very few blacks.[5]

However, the above discussion of the personnel board's purported criteria assumes that the criteria were in fact applied to the two white firepersons as well as to Williams, albeit in the case of Williams without his knowledge. The court does not accept this assumption. The court is of the opinion and so finds that the board in the Williams case never actually engaged in the comparisons it now asks this court to make and instead it simply upheld and applied the Fire Department's across-the-board policy of discharge.

It should be added that the Fire Department is not without fault in this matter. The evidence amply supports the conclusion that while the Fire Department had an across-the-board dismissal policy of persons convicted of felonies, the department did not seriously seek to have the policy upheld by the personnel board in the cases of the two white firepersons; whereas, with Williams there was no such "indirect support."

Williams, as a victim of racial discrimination, is now entitled to appropriate relief.

III. RELIEF

A person who is a victim of a Title VII violation is entitled to be placed as near as is practicable in the position in which he or she would have been but for the discrimination, subject to some restrictions on backpay. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419-25, 95 S.Ct. 2362,

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[5]In fact, at the time of trial only 25 out of 355 firepersons in the department were black. The City of Montgomery has a black population of at least 39%.

2372-75 (1975). This "make-whole" relief available under Title VII includes first, reinstatement to the position sought, with accompanying promotions and retirement and other benefits which the person would have received had he or she not been illegally denied employment; and, second, backpay from as far back as two years prior to the required filing of a charge with the Equal Employment Opportunity Commission or as far back as the time of the discriminatory dismissal, whichever is more recent, until the time of the person's reinstatement by the employer charged with discrimination, less any amounts the person earned or in the exercise of reasonable diligence should have earned in the interim. 42 U.S.C. § 2000e-5 (g). *See also Marks v. Prattco, Inc.*, 633 F.2d 1122, 1125 (5th Cir. 1981) (per curiam). This backpay relief must be against the defendants in the instant case in their *official* capacities only; Title VII provides no authority to hold public officials *individually* liable for backpay awards. *Clanton v. Orleans Parish School Board*, 649 F.2d 1084, 1099 & n.19 (5th Cir. 1981). Finally, a victim of a Title VII violation is entitled to an award of reasonable attorney fees, 42 U.S.C. § 2000e-5 (k), determined in accordance with standards set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

The court is of the opinion that Williams is entitled to the above relief against all the defendants in their official capacities, subject to the qualification that his backpay should extend only as far back as January 25, 1980, the date of the personnel board decision, rather than to November 14, 1979, when he was discharged, and subject to the further qualification that he suffer a reduction in pay comparable to any Morgan may have received.[6] Morgan

[6]The personnel board and its members contend that any equitable relief under Title VII granted by this court would be inappropriate against them; they claim that they are not "employers" within the meaning of

and Evans did not receive backpay for the period of time between their discharge and reinstatement by the personnel board and Morgan may have received a reduction in pay; Williams should be treated similarly.

IV. CONCLUSION

The court feels compelled to add that there is nothing inherently unlawful, under the provisions of Title VII prohibiting racial discrimination, with the defendants, including the personnel board and its members, adopting an across-the-board policy of dismissal regarding firepersons convicted of criminal offenses, as long as that policy is enforced against all firepersons, without regard to race; and further that there is nothing similarly unlawful with the defendants, including the personnel board and its members, adopting exceptions to that policy, as long as the exceptions are articulated to a reasonable degree and are made known to and applied to all firepersons, without regard to race.

An appropriate judgment will be entered in accordance with this opinion.

DONE, this the 19th day of October, 1982.

/s/ MYRON H. THOMPSON
UNITED STATES DISTRICT JUDGE

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42 U.S.C. § 2000e (a), (b). The City of Montgomery and its mayor, Emory Folmar, and the city's Fire Department, and its chief, Jim Sutherland, contend, on the other hand, that they cannot be held liable under Title VII because the personnel board, not the city and its officials, was responsible for any racially discriminatory actions against Williams.

The evidence reflects, however, that the City of Montgomery is an employing authority within the meaning of Title VII; and that the personnel board and its members, to the extent that they exercise authority over the employees of the City of Montgomery, *see* note 2, *supra*, and the remaining defendants are all agents of the City of Montgomery. Therefore, all the defendants are proper defendants in their official capacities. *Clanton v. Orleans Parish School Board, supra*, 649 F.2d at 1095 n.13.

FEB 19 1985

NO. 84-1184

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1984

THE CITY OF MONTGOMERY,
ET AL., PETITIONERS,

VS.

TATE WILLIAMS, RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT

SOLOMON S. SEAY, JR.
Post Office Box 6215
Montgomery, AL 36106
(205) 834-2000

ATTORNEY FOR RESPONDENT

BEST AVAILABLE COPY

COUNTERSTATEMENT OF THE QUESTIONS INVOLVED

1. Should certiorari be granted to review the opinion of a court of appeals upholding a district court finding that Tate Williams, a black City of Montgomery fire fighter, was the victim of racial discrimination when he was terminated upon conviction of a felony while two white fire fighters who were previously convicted of a felony remained as fire fighters despite a mandatory policy which required termination upon conviction of a felony?

2. Should certiorari be granted to review the opinion of a court of appeals which affirmed a district court order holding that the City-County Personnel Board is not entitled to absolute immunity or good faith immunity where there is an abundance of judicial precedent in this

circuit to support the affirmance, and there are apparently no conflicts with decisions of other federal courts of appeals on the same matter?

3. Should certiorari be granted to review the opinion of a court of appeals which affirmed, on the ground that it was not clearly erroneous, the district court's finding of ultimate fact of racial discrimination in the termination of Respondent Tate Williams?

PARTIES

Parties to the proceeding are correctly set forth in Petitioners' Petition.

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OPINIONS AND JUDGMENTS IN THE COURTS BELOW

The Opinions of the United States Court of Appeals for the Eleventh Circuit and of the United States District Court for the Middle District of Alabama are included in the Appendix to the Brief of Petitioners.

JURISDICTION OF THE SUPREME COURT

Respondent does not contest jurisdiction of this Court to review this case pursuant to Title 28, United States Code, § 1254(1). Respondent submits, however, that this is not a proper case for review on writ of certiorari.

STATEMENT OF THE CASE

The Statement of the Case set out in Petitioners' Brief is correct; thus Respondent adopts same.

STATEMENT OF FACTS

Respondent adopts as a Statement of Facts those facts set out in the District Court's Findings and the Court of Appeals Order of Affirmance dated May 3, 1984.

> "The City of Montgomery, Alabama's (City) fire department policy required the discharge of any fire fighter convicted of a felony. In August, 1976, two white fire fighters were convicted of a felony, and the fire department discharged them. The employees, however, appealed their dismissals to the Montgomery City-County Personnel Board (Board), and the Board reinstated them.[1] In November, 1979, Tate Williams, the appellee, a black fire fighter, was convicted of a felony. The

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[1]The Board handles employment matters for the City and the County of Montgomery.

> fire department dismissed him, and he was not reinstated by the Board. Williams filed a complaint with the Equal Employment Opportunity Commission and the Commission issued him a "Right to Sue" notice. Williams then sued the City, the Board, and other appellants in district court seeking reinstatement to his job and backpay."

REASONS FOR DENYING THE PETITION

1. The Court of Appeals correctly held that the Montgomery City-County Personnel Board is an employer or agent of an employer as that term is defined under Title VII of the Civil Rights Act of 1964 and 42 U.S.C.S. § 2000e.

Petitioners argue that the issue of whether the Montgomery City-County Personnel Board is an agent of the City and County governments merits Supreme Court consideration. Respondent would respectfully disagree.

42 U.S.C.S. § 2000e defines "employer" as: "a person engaged in industry affecting commerce who has fifteen or more employees...and an agent of such a person ...."

The City-County Personnel Board is delegated the authority, pursuant to Alabama Act No. 2280, Section 5, to test and certify prospective employees, determine how employment lists are to be maintained and in what order eligibles shall be placed on the list, establish a pay plan for all classified employees, adopt working hours for employees and formulate and adopt rules governing examination, certification, appointment, and separation of employees. (See Exhibit D of Section 5 of Petitioners' Petition for Writ.)

The question thus arises whether the responsibilities outlined above

establish the Montgomery City-County Personnel Board as an agent of the employer, the City and County of Montgomery. Cases have held that such delegated responsibility establishes an agency relationship. In Howard v. Ward City, 418 F.Supp. 494, the court held that the board of commissioners who had the responsibility of raising salaries for sheriff deputies, and refused to raise the salary of a female deputy was an agent of the county and employer within the meaning of Title VII.

In Puntolillo v. New Hampshire Racing Commission, 375 F.Supp. 1089 (1974), the court held that the state racing commission and state prodding and breeding association, which controlled licensing of and stall space for driver trainers of harness horses were "employers" within contemplation of the equal employment

provisions of the Civil Rights Act of 1964.

In Manley v. Mobile County, Alabama, 441 F.Supp. 1351 (1975), the court held that where the county commission was required to provide the county sheriff with such quarters, supplies and equipment as were reasonably necessary for operation of his office, so that a money judgment against the sheriff or his department alone would have substantially less meaning or efficacy, the economic ties between the county commission and the sheriff's office provided sufficient nexus between the sheriff's department and the county to warrant the county's inclusion as "employer" defendant in an action brought under Title VII of the Civil Rights Act of 1964 alleging sex discrimination in employment on the part of the sheriff's department.

"The term employer under Title VII has been construed in a functional sense to encompass persons who are not employers in conventional terms, but who nevertheless control some aspect of an individual's compensation, terms, and conditions or privileges of employment....

"Holding responsible those who control the aspects of employment accorded protection under Title VII is consistent with the congressional intent that the act's effectiveness not be frustrated by employers delegating authority for its employees compensation, terms, conditions or privileges of employment to third persons...and that the act be interpreted liberally in order to achieve its remedial purpose of eradicating discrimination in employment...Spirt v. Teachers Insurance and Annuity Association, 475 F.Supp. 1298 at 1308 (1979). See also EEOC v. Sage Realty Company, Inc., 87 FDR 365 (1980)."

In Cannon v. State of Delaware, 523 F. Supp. 341 (1981), the plaintiff filed a claim against the personnel commission alleging a refusal to give her a hearing after her dismissal, its failure to explain why she was not offered a

hearing and the subsequent use of allegedly improper evidence at the hearing the commission did provide. The court found that it need not conclude that the personnel commission is an employer in the usual sense because the act expressly reaches the conduct of "any agent" who's conduct may violate the terms of 42 U.S.C.S. § 2000e-2(a).

The Court of Appeals correctly held that the City was an employer, and having delegated to the Personnel Board certain traditional employer functions, the Board, for purposes of Title VII, was agent for the City.

2. The Court of Appeals correctly held that the Montgomery City-County Personnel Board is not entitled to absolute or qualified immunity against a backpay award since by the very nature

of the members appointment and proceedings before the Board, the safeguards normally entering in the judicial process were absent.

In support of Petitioners' immunity argument, Petitioners cite Butz v. Economou, 437 U.S. 478, S.Ct. 2894 (1978), for the proposition that judicial immunity is extended to executive officials acting in a judicial capacity. Petitioners argue that when Petitioners carry out their legislatively mandated responsibility to govern the separation of an employee from employment, Petitioners are acting in a judicial capacity, and, therefore, immune from suit.

The Eleventh Circuit Court of Appeals held in this case that the Petitioners are not insulated from political influence; the City, the County, and judges of the county appoint Board members for a limited time;

the Board does not record its proceeding unless a party requests it; no judicial review of the Board's decision exists; therefore, the safeguards present in a federal agency hearing do not exist in the Board's hearing.

The Supreme Court held in Harlow v. Fitzgerald, 457 U.S. 800, 806, 102 S.Ct. 2727, 2732, 73 L.Ed.2d 396 (1982), that government officials whose special functions or constitutional status require complete protection from suits for damages --including certain officials of the executive branch, such as prosecutors and similar officials and the President, are entitled to defense of absolute immunity; however, executive officials are usually entitled to a qualified or good faith immunity.... Absolute immunity for judicial functions has extended no further than its justification would warrant. Id. 102 S.Ct. at 2735.

Qualified immunity as redefined by the Supreme Court in Harlow, supra, permits state officers to be subjected to suit only if the official's conduct clearly violates an established statutory or constitutional right of which a reasonable person would have known. Galvan v. Garmon, 710 F.2d 214 (5th Cir., 1983).

> "Absolute immunity has been extended to officials other than judges when their activities are intricately related to the judicial process and when they must exercise discretion comparable to judges. See e.g., Imber v. Patchman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) (prosecutor initiating and pursuing a criminal prosecution); Simons v. Bellinger, 643 F.2d 774 (D.C. Cir., 1980) (members of a committee appointed by court of appeals to monitor unauthorized practice of law); Ashbrook v. Hoffman, 617 F.Supp. 474 (7th Cir., 1980) (partition commissioner effect in a divorce settlement); Stift v. Lynch, 267 F.2d 231 (1959) (justice of the peace)...
>
> "In assessing whether absolute immunity should shield the defendant, the court must

> consider three public policy factors: (1) "the functional comparability" of his judgment to those of a judge; (2) the nature of the controversy in which he participated; and, (3) the adequacy of safeguards to control unconstitutional conduct. See Crosby-Bey v. Jansson, 586 F.Supp. 96 (1984).

While Respondent does not concede that Petitioners have met their burden in establishing the first and second public policy factors necessary to invoke the doctrine of absolute immunity, Respondent limits his analysis of said public policy factors to the adequacy of safeguards to control unconstitutional conduct.

Probably the most important safeguard built into the judicial process is the insulation of the trier of fact from political influence. Butz, supra at 513. The Petitioners/Personnel Board consists of three members, one appointed by the County, one appointed by the City, and one appointed by the majority of the

circuit judges and probate judge of the County. The rules and regulations of the City and County Personnel Department provide that a permanent employee may be dismissed by an appointing authority, appointing authority meaning the governing body, officer, board, commission, person or group empowered to appoint or remove employees of the agency of which he is the responsible administrator.

The government, body, officer, etc., responsible for appointing members of the Personnel Board is the same government, body, officer, etc., with authority to dismiss an employee. The safeguards which extend to a judge absolute immunity are absent in the relationship of the Personnel Board members and the City and County governments.

The Butz, supra, court held that:

> "The process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by parties or other officials within the agency. When conducting a hearing... a hearing examiner is not responsible to, or subject to the supervision or direction of, employees or agents engaged in the performance of investigative or prosecution functions of the agency. A hearing examiner may not consult any person or party, including other agency officials, concerning a fact at issue in the hearing, unless on notice and opportunity for all parties to participate. Hearing examiners must be assigned to cases in rotation so far as is practicable. They may be removed only for good cause established and determined by the civil service commission after a hearing on the record. Their pay is also controlled by the civil service commission."

Id., 514-515.

The duties of the City-County Personnel Board are so interwoven with the operation of the City and County governments that it cannot be said that the Board possesses

the independence of an agency hearing examiner. The Board's duties include, but are not limited to, the testing and certifying of prospective employees, determining how employment lists are to be maintained and in what order eligibles shall be placed on the lists, establishing a pay plan for all classified employees, adopting working hours for employees, and formulating and adopting rules governing examination, certification, appointment and separation of employees. Indeed, the City-County Personnel Board is structured in such a manner that there exists the appearance that the decisions of the Board may be easily influenced by the appointing authorities. The Butz court also made reference to the transcript of testimony as being a necessary safeguard to the judicial process and designed to guarantee the independence

of a hearing examiner. The court stated:

> "A party is entitled to present his case by oral or documentary evidence, and the transcript of testimony and exhibits together with the pleadings constitute the exclusive record for decision."

Id. at 513.

An essential safeguard of a judicial proceeding is a record of the proceeding. The record tends to enhance truthfulness in the testimony of witnesses and provides a recording of the proceeding which may be reviewed on appeal. See Butz at 516 where the court compared an agency attorney in conducting a trial and presenting evidence on the record to the trier of fact to the functions that a prosecutor brings before a court.

The right to appeal a decision of the Board is also a necessary safeguard in the judicial process. Butz, supra at 512. The legislation creating the

Montgomery City-County Personnel Board does not allow for the appeal of a decision of the Board. The only option available to an employee for a decision adverse to him by the Personnel Board is to seek redress in the courts. Judicial review is limited to claims that the proceedings were unconstitutional. In most agency proceedings, a party may appeal the decision of the agency to an independent trier of fact. Such right is usually granted by statute or regulation. Most reviews are de novo reviews which are limited to the record made at the agency hearing. No such fact exists in the facts and circumstances of this case.

Therefore, Petitioners have failed to meet the public policy considerations necessary to afford Petitioners absolute immunity. The hearing afforded Respondent failed to offer the basic safeguards of a judicial hearing.

3. The application of the "clearly erroneous" standard of review by the Eleventh Circuit Court of Appeals to this case was correct.

Petitioners argue that the Eleventh Circuit Court of Appeals incorrectly applied the "clearly erroneous" standard of review in this case. In support of this position, Petitioners cite Mayo v. Pioneer Bank & Trust Company, 297 F.2d 392 (5th Cir., 1961) for the proposition that when the factual determination is primarily a matter of drawing inferences from undisputed facts or determining their legal implications, appellate review is far broader where disputed evidence and questions of credibility are involved.

The facts in this case are simple; at all times material to this case, the City of Montgomery had a policy which required the termination of any fire

fighter convicted of a felony. This policy was mandatory. Morgan and Evans are white fire fighters who were convicted of felonies and who were retained as fire fighters. Respondent Tate Williams, a black fire fighter, was convicted of a felony and terminated consistent with the Fire Department's mandatory policy. The district court found that Tate Williams was the victim of racial discrimination. The court of appeals held that this finding was not clearly erroneous.

In Pullman Standard v. Swint, 456 U.S. 273, the Supreme Court held that the question of whether the differential impact of a seniority system reflected an intent to discriminate on account of race was a pure question of fact subject to Rule 52(a)'s clearly erroneous standard; it is not a question of law and not a mixed question of law and fact.

The question of whether the Petitioners actions in terminating the Respondent, a black fire fighter after his conviction of a felony consistent with the Fire Department policy requiring mandatory termination upon conviction of a felony while retaining Morgan and Evans, white fire fighters, upon their conviction of felonies, resulted in a violation of the Respondent's constitutional rights is a pure question of fact, subject to Rule 52(a)'s clearly erroneous standard. The court further held in Pullman Standard, supra, that:

> "Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligations of a court of appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts."

Therefore, the Court of Appeals application of the "clearly erroneous" standard of review in this case was not error.

CONCLUSION

Petitioners raise several issues in their petition, none of which begin to meet the standards this Court would apply for reviewing a writ of certiorari. Indeed, all of the issues have been addressed by the federal courts of appeals and there appears to be uniformity in the decisions of the federal courts of appeals. Whether legislatively mandated boards which govern access to employment are employers under Title VII of the Civil Rights Act of 1964 does not present a novel issue, or an issue which has not been adequately addressed by the federal courts of appeals.

The issue of immunity for boards serving in a quasi-judicial capacity has also been adequately addressed by the federal courts of appeals. Consistent standards have been established by the courts of appeals to determine when a board, body or individual is serving in a judicial capacity and thus entitled to immunity.

Lastly, the standard of review of cases tried by a judge without a jury in federal district courts is well established in the Federal Rules of Civil Procedure and is supported with ample precedent from this Court.

Petitioners Petition for Writ of Certiorari should, therefore, be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Solomon S. Seay, Jr., a member of the Bar of the Supreme Court of the United States and the attorney for the Respondent Tate Williams, hereby certify that on this the 15th day of February, 1985, I did serve the requisite number of copies of the foregoing on the attorneys for all of the other parties in the Court of Appeals, by mailing the same to them, first-class postage prepaid and addressed as follows:

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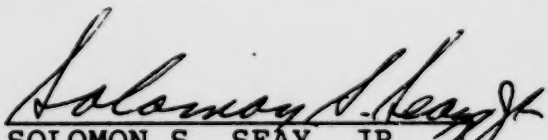

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